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No. 1451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

HELEN M. SLIFKA, formerly known as HELEN SCHUSTEK, and IRVING A. SCHUSTEK, as Executors of the Estate of GEORGE SCHUSTEK, Deceased,

Petitioners,

—VS.—

JAMES W. JOHNSON, Collector of the Third Internal Revenue District of the State of New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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—vs.—

JAMES W. JOHNSON, Collector of the Third Internal Revenue District of the State of New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York dismissing the complaint in an action brought by the petitioners, executors of the Estate of George Schustek, to recover $18,719.68 in estate taxes which petitioners paid on behalf of the estate upon proceeds of certain policies of life insurance.

Opinions Below

The opinion of Mandelbaum, *D. J.* (pp. 108-111), and the majority and concurring opinion of the Circuit Court of Appeals (pp. 117-125) appear in the record.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit was rendered on March 12, 1947 (p. 126). The jurisdiction of this Court is invoked on the ground that the decision of the Circuit Court in holding that the transfers were made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended, solely on the ground that the dominant motive of the testator was the avoidance of estate taxes, is in conflict with *Allen* v. *Trust Company of Georgia*, 326 U. S. 630, and upon the further ground that the decision of the Circuit Court is in conflict with the rule obtaining in the Fifth Circuit (*Allen* v. *Trust Company of Georgia*, 149 F. (2d) 120, aff'g, 55 Fed. Supp. 269) and in the Third Circuit (*Denniston* v. *Commissioner*, 106 F. (2d) 925). Although this Court granted certiorari in *Allen* v. *Trust Company of Georgia*, 326 U. S. 630, because of the apparent conflict between the rulings of the Second and Fifth Circuits, conflict still exists between the Circuits as to whether a mere desire to save estate taxes requires a holding as a matter of law that a transfer was made in contemplation of death within the meaning of the Revenue Act.

Questions Presented[1]

1. Whether the motive of a testator to save estate taxes in assigning life insurance policies necessarily implies that the assignments were made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926 (Section 811(c) Internal Revenue Code).

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1 Petitioners respectfully reserve the right to argue other questions involved in this appeal in the event this petition is granted.

2. Whether the proceeds of certain contracts of life insurance were properly included in the estate as transfers made in contemplation of death.

3. Whether the proceeds of said policies of life insurance were properly included in the estate as transfers intended to take effect in possession or enjoyment at or after decedent's death.

4. Whether the evidence of the insurance broker regarding the motive of the testator in making the assignments of the life insurance policies was binding on the executors of the deceased, in view of the limited scope of the broker's authority.

Statute Involved

The Statute in force at the time of decedent's death relating to transfers in contemplation of, or taking effect at, death is found in Section 811(c) of the Internal Revenue Code:[2]

"Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

* * * * *

"(c) Transfers in contemplation of, or taking effect at death.

To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or other-

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2 Section 302(c) of the Revenue Act of 1926, as amended.

wise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;"

Statement

Between 1919 and 1936, the deceased insured his life in six life insurance companies in sums totalling $17,400. (Exs. 3-14). His wife Helen (one of the petitioners) was named as sole beneficiary in all policies, except one for the insured's mother and one for his daughter. Some of these policies on December 23, 1929, were transferred to the City Bank Farmers Trust Company and others, in trust for certain uses and purposes (p. 80). This trust was revoked in December, 1935, so as to make a gift to his wife.

In 1936, some five years before his death on April 25, 1941, the deceased transferred the absolute ownership in the twelve policies to his wife Helen, and alternatively to his daughter Gloria. His wife was named as primary benefi-

ciary in all policies. The assignments to the insured's wife were absolute. She received the absolute legal title to the policies and by consequence had all the attendant economic benefits such as the power to change the beneficiary, to surrender or cancel the policies and to obtain the cash surrender value, to pledge them for a loan and otherwise to exercise all the incidents of ownership.

At the time of the assignments, it did not appear that the insured had ever borrowed against the policies, nor that the cash surrender value was in any way curtailed (p. 47). It affirmatively appears that the insured intended to divest himself utterly of any interest in the policies or their proceeds (pp. 91-93).

When the assignments were made in 1936, George Schustek was 45 years old; his health was excellent then and until his death; in August and November 1936, he obtained new policies of life insurance, from the Guardian Life and Connecticut Mutual Life Insurance Co., upon undergoing rigorous physical examinations. His mental condition too was excellent, and he managed his business of cotton converter practically alone. He displayed a vital interest in the charitable affairs of the community and in athletic activities and engaged in normal plans associated with living motives. His activities looked toward life and its activities; he displayed no apprehension of death other than that shown by all men.

The stipulation of facts in the record (pp. 43-60) provides that the insured was examined in 1936 by a physician at the request of the Connecticut Mutual Life Insurance Company in connection with his application for insurance, who found that the insured's heart was normal "and the organ free from every indication of disease and found no palpitation, irregular action or any disease or disorder of the heart" (p. 48). The doctor found from his examination that the in-

sured was in "good health and I classified him as a first class risk" (p. 49). The stipulation also set forth the testimony of the physician who examined the insured at the request of the Guardian Life Insurance Company of America in 1936, at the time of the assignments. This physician also found the insured to be in good health and nothing "which would render the risk in any way undesirable."

At the trial the Government introduced the testimony of Milton Berson, an insurance broker associated with Julius Finn & Co. Mr. Berson testified to his conversations with the deceased at the time the transfers were made. Many reasons appear for the transfers:

(1) the advantage of dissolving the insurance trust theretofore set up with the City Bank Farmers Trust Company and having the insurance companies deal with the proceeds under their Modes of Settlements, since in this way the necessity of the corporate trustee obtaining the proceeds and setting up the trust would be saved (p. 80).

(2) the availability of immediate income to the insured's wife at the guaranteed rates of 3% to 3½% without the expenses of a trusteeship and without the delay occasioned by waiting for a return on investments (p. 80).

(3) the vesting of absolute and immediate ownership in the insured's wife, during his lifetime so that his wife would have all the rights in the policies as to loans, cancellations, assignments, as she saw fit for her own benefit (p. 92).

(4) the divesting of any right in the insured to control the policies (p. 92).

(5) the vesting of the proceeds of the policies in the insured's wife, should she predecease him (p. 93).

(6) the exemption from estate taxation which the broker thought could be accomplished under these circumstances (p. 81).

The District Judge sitting without a jury found that decedent was in good health at the time of the transfers and did not anticipate imminent death at that time (p. 111) but that "the evidence of decedent's good health has contributed nothing to plaintiffs' case" (p. 110). The Court further found that the preponderant motive of the decedent in transferring the policies to his wife was to avoid or to escape estate taxes (pp. 110-111). "Accordingly" the Court found that the transfers were made in contemplation of death within the meaning of the Act and the proceeds properly included in the decedent's gross estate (*ibid.*).

The District Court found it unnecessary to pass upon the plaintiffs' contention that the transfers were not intended to take effect in possession or enjoyment at or after death.

The Circuit Court of Appeals also did not base its holding upon any possible reversionary interest in the donor sufficient to condemn the transfers as taking effect in possession or enjoyment at or after death. The Circuit Court held that the finding of the Trial Court that the testator's preponderant motive in making the transfers was the avoidance of estate taxes sufficed to bring all the policies into the estate as transfers made in contemplation of death.

The Circuit Court also held that the statements of the decedent's purpose contained in the letter of his broker were competent evidence against the plaintiffs. This holding was premised by the majority on the ground of the "Course of Business" statute of the State of New York (Section 374-a Civil Practice Act). The concurring opinion wanted it understood that the majority opinion did not involve a repudiation of the decision of this Court in *Palmer* v. *Hoffman*, 318 U. S. 109.

Specification of Errors

The United States Circuit Court of Appeals erred:

1. In holding that the decedent's motive of avoiding estate taxes in making the transfers of the life insurance policies herein necessarily compels a ruling that the transfers were made in contemplation of death.

2. In failing to hold that the desire to avoid taxes has no legal effect and no probative value as evidence of a special concern about death and is not conclusive proof that the transfers were made in contemplation of death.

3. In failing to hold that the testator's physical condition which was stipulated to be excellent at the time of the transfers and the testator's age, which was 45, and all the other circumstances surrounding the execution of the assignments were probative of the fact that the transfers were not made in contemplation of death.

4. In failing to hold that the assignments of the policies of life insurance were not transfers intended to take effect in possession or enjoyment at or after the decedent's death.

5. In holding that the letters from the insurance broker to two of the insurance companies were admissible and competent evidence against the executors, in view of the limited authority of the broker.

Reasons for Granting the Writ

The questions raised by this petition are of great public importance, involving the basic meaning and construction of the provisions of the Internal Revenue Code, which require the inclusion in a decedent's estate for tax purposes

of transfers made in contemplation of, or taking effect at, death. The issue tendered by the opinions of the District Court and the Circuit Court of Appeals is whether transfers made to avoid the payment of death taxes are, as a matter of law, to be interdicted as being made in contemplation of death.

The Second Circuit assiduously holds to the rule that a transfer made to avoid estate taxes necessarily must result in a finding that the transfer was made in contemplation of death (*Farmers Loan & Trust Company* v. *Bowers*, 68 F. (2d) 916; *Farmers Loan & Trust Company* v. *Bowers*, 98 F. (2d) 791; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. (2d) 940; *Vanderlip* v. *Commissioner*, 155 F. (2d) 152; cert. den. October 14, 1946).

The contrary rule is followed in the Third Circuit (*Denniston* v. *Commissioner*, 106 F. (2d) 925), and in the Fifth Circuit (*Allen* v. *Trust Company of Georgia*, 149 F. (2d) 120).

This Court in the *Allen* case (326 U. S. 630) resolved the apparent conflict between the Second and Fifths Circuits, deciding in favor of the taxpayer and holding that the renunciation of a power to amend a trust "so that the trust could not be a part of his estate for estate tax purposes" was not made in contemplation of death. The ruling of this Court was disregarded by the Second Circuit in the case at bar (which failed to cite the *Allen* case), or else the question must be regarded as still unsettled. In either event, certiorari should be granted so as to clarify the law and to resolve the conflict which still maintains between the Circuits.

It is of vital interest to all citizens of this nation, all of whom as potential testators are affected by the unsettled condition of the law, that the rule be firmly established. The doctrine which prevails in the Second Circuit results in penalizing the attempt to avoid estate taxes in a legal way.

Such rule does not exist with respect to income taxes; it is neither a proper nor a viable rule with respect to estate taxes.

The principle of the Second Circuit, as restated in the instant case, would serve to brand, as a transfer made in contemplation of death, a transaction such as this made by a 15-year old boy in perfect health. At bar, the ruling has produced a similar result, because the decedent was a man in the prime of life, whose every act and motive was associated with life, and not with death, and who died of the unsuspected ailment of leukemia.

Although neither the District nor the Circuit Court passed upon the question whether these transfers were intended to take effect in possession or enjoyment upon death, it is clear that the four policies written by the Mutual Life Insurance Company of New York did not reserve in the decedent any reverter or interest substantial enough to render the property transferred subject to inclusion in the decedent's estate, (*Goldstone* v. *U. S.*, 325 U. S. 687).

Since the Second Circuit expressed some doubt in the instant case as to the effect of the *Goldstone* case on an interest which becomes part of an estate by operation of law (p. 121), and since the Tax Court refuses to include such an interest in the taxable estate (*Estate of Weil*, T. C. Memo, Rev. Rept. Dkt. No. 4052, November 1, 1946, cross-appeals to Sixth Circuit pending; *Estate of Hughes*, 7 T. C. 157), clarification by this Court is essential, so that an interest as remote as that of the decedent's estate to the proceeds of the Mutual Life policies should not be held to be a sufficient "string" requiring inclusion in the estate.

The letters of the insurance broker which stated that two of the transfers were "for the purpose of avoiding payment of taxes" (pp. 105, 107) transcended the broker's authority to obtain "information or forms" (pp. 104, 106). They were surely not made in the course of business, nor was it shown

that it was the broker's custom to make such statements (within the requirements of Sec. 374-a of the Civil Practice Act of the State of New York), and should not have been admitted against the executors. Their inclusion over objection was contrary to *North Western Union Packet Co.* v. *Clough*, 87 U. S. 406, 408, and *Palmer* v. *Hoffman*, 318 U. S. 109. There is no proof that authority to declare the testator's mind was given the broker. Such authority was improperly inferred. (Sec. 288, Restatement of Law of Agency.) To clarify this question, it is desirable that certiorari be granted.

1. *The assignments of the policies were not made in contemplation of death within the meaning of Sec. 811(c) of the Internal Revenue Code. The assignments were not conclusively stamped as "in contemplation of death" because the testator used a method best calculated to save estate taxes.*

A complex of motives actuated the assignments of the insurance policies, which had been placed in a revocable insurance trust. Among these was the desire that the decedent's wife should have the legal and economic benefits resulting from absolute ownership of the policies, such as the right to cancel them or to borrow against them. Even if the dominant motive was the desire to save taxes, standing alone, such desire is not probative of the mental state required by the statutory phrase "contemplation of death."

The Third and the Fifth Circuits squarely hold that the fact that a transfer was made to avoid estate taxes is insufficient, without other evidence of a motive associated with death, to support a finding that a transfer is made in contemplation of death.

In *Denniston* v. *Commission, etc.* (C. C. A. 3, 1939), 106 F. (2d) 925 at page 927, it is stated:

"The question remains, however, whether the fact that a transfer was made to avoid estate tax is, without any other evidence of a motive associated with death, sufficient to support an ultimate finding or conclusion that the transfer was made 'in contemplation of death,' within the meaning of section 302 of the Revenue Act.

* * * * *

"In Colorado Bank v. Comm'r, 305 U. S. 23, 27, 59 S. Ct. 48, 49, 83 L. Ed. 20, the Court said: 'The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was "in contemplation of death." Broadly speaking, thoughtful men habitually act with regard to ultimate death, but something more than this is required in order to show that a conveyance comes within the ambit of the statute'.

"*We think that because in carrying out a plan to provide for her children the donor uses a method which she thinks is best calculated to save death taxes the conveyance is not thereby conclusively stamped as 'in contemplation of death.' The desire to avoid estate taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death'*" (Italics ours).

In *Allen* v. *Trust Company of Georgia*, 55 Fed. Supp. 269, aff'd 149 F. (2d) 120, the Fifth Circuit agreed with the Third Circuit. There, some years prior to his death, the deceased created two spendthrift trusts for his son and daughter to meet their necessities and to set aside property

free from all claims. However, he retained under the trust a power to amend with the consent of the trustee and beneficiary. He believed that the gifts were complete and absolute but when this Court in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85 decided that the reservation of a power to amend brought the corpus of the trust into the settlor's estate, even though the power could not be exercised by the settlor alone, "the decedent executed an instrument renouncing the power to amend the trust", for the reason as stated by this Court that he was "advised in 1937 that the gifts remained a part of his estate for estate tax purposes. * * * *This was done so that the trust could not be a part of his estate for estate tax purposes*" (326 U. S. 630).

In holding that the transfers were not made in contemplation of death, the lower court discussed the applicable principles in language apposite to the case at bar as follows (pp. 269, 270 of 55 F. Supp.):

> "In making the release he was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ultimate death, and, in 1925, 1934, and 1937, he did not entertain thoughts of death except the general expectation of death that all entertain. He was motivated in making the gifts by a desire to meet the needs of his children and to set aside property for the benefit of them and their families, freed from all claims, tax or otherwise, and he made the release of the power to effect his original purpose in executing the trusts and to take the property out of his estate as he thought he had already done. Neither the execution of the trusts nor the release of the power was done in contemplation of death except in the sense that all men expect to die at some time. * * *

"The property is classified as estate property or not according to the facts existing at the time of transfer and not by any desire to avoid taxes. * * * A *desire to avoid taxes has no legal effect and it has not probative value even as evidence of special concern about death, because in any transfer such a desire exists equally whether the thought of death is special or general.* If a special concern about death exists, then a desire to avoid taxes becomes the motive for electing to transfer by gift instead of by will. At that point the statute applies and declares such a transfer to be in effect a gift after death. However, it still remains true that the special concern about death *must exist before* the statute *is operative.* The motive to dispose of property before death and the motive to dispose of it after death, which motives are controlling, must not be confused with a motive to adopt one form of transfer instead of another, which motive may itself arise from a desire to avoid taxes. If the natural, human desire to retain property is overcome by this recognition of approaching death, the motive is one to dispose of property after death, but, if the desire to retain property is overcome by a desire that others have the benefit of it before death and regardless of when the donor should die, the motive is one to dispose of property before death. A desire to avoid taxes may be present in either case but does not affect the result. It simply explains why donor, in attempting to dispose of property after death, put the transfer in the form of a gift.

"A gift in contemplation of death is one which, in substance, though not in form, approximates a transmission of property from the dead to the living and which effects, for practical purposes, nearly the same result

and, therefore, serves as a substitute for a testamentary disposition. Such a gift falls within the same classification as a transfer intended to take effect at or after the death of the transferor. The effect of the gift must be, in substance, approximately the same as if the property has been transmitted by will, and the motive of the donor must have been such as would have induced him to dispose of the property by will.

"The Government contends that a transfer made for the purpose of avoiding the tax is necessarily made in contemplation of death and cites the following Regulation: 'A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property or for any other motive associated with death'. That Regulation is broad enough to include the general expectation of death and is, therefore, in partial conflict with the case of United States v. Wells, 283 U. S. 102 * * * which holds that the words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain."

and continuing at pages 270 and 271 the Court stated:

"According to that decision, if a donor has no expectation of death, except in that general sense, a gift by him would not be made 'in contemplation of death' in the statutory sense. A young man in perfect health, who anticipates that he will live out his normal expectancy, could not be said to have contemplated death, in that limited sense, in making a gift, though he made it to avoid estate taxes. A donor may contemplate death in the general sense and in that state of mind give away property to avoid estate taxes."

and the Court stated further at pages 271 and 272:

> "The value which is included in the estate is the value of the transferred property at the death of the donor. If a man in the prime of life, with no expectation of death except that death at some time is inevitable, made a gift for the very purpose of avoiding at some time the estate tax, then continued in life for 50 years, it cannot be reasonably said that Congress intended to follow that property for a half century and include its value at the death of the donor in his estate. If such gift by one man happened to be of property consumed in the use before donor's death, it would have no value to be included in his estate, whereas if such a gift by another man was of property not consumed in the use, its value would be included in his estate. Such construction would lead to inequality of taxation, depending upon the character of the property. Moreover, such a gift would in no sense be a substitute for a will, motivated by a desire that the donee have the benefit of the property after the donor's death. It would not accomplish or be designed to accomplish, in substance, the same result as a will. The statute did not intend to prevent a gift for the purpose of avoiding estate taxes, but did intend to retain in the estate property transferred in form by a gift, but in fact by a will.
>
> "*Congress has not undertaken to penalize a desire or motive to avoid taxes, or an effort to avoid taxes in any legal way. In fact, a desire or intention to avoid taxes, if legally possible, might well be assumed in any transaction.* On the other hand, Congress by implication recognizes the existence of a well-nigh universal desire and purpose to handle transactions in such a way as

legally to avoid taxes. Accordingly, Congress simply enacted that certain kinds of transfers should not have such legal effect.

"In this case the donor was a lawyer and presumably was acquainted with tax statutes and the court decisions construing tax statutes. He made the 1925 and 1934 trusts for reasons associated with continued life and not in contemplation of death in the sense of the statute. He probably made them purposely in such form as would avoid estate taxes under the law as construed at that time. This he had a legal right to do, the transfers not being made in contemplation of death except in the general sense. When his attention was called to a construction of the law which would leave the property in his estate for tax purposes, he released the power. He did that, no doubt, to make effective his original design to take the property out of his estate. He had a legal right to do that, unless his motive in executing the release grew out of a desire to effect in substance a testamentary disposition of the property; that is, a desire to make the property available for the benefit of the donees after his death."

On the ground of apparent conflict between the Fifth Circuit and the Second Circuit, this Court granted certiorari in the *Allen* case and ruled in favor of the taxpayer.

This Court pointed out (326 U. S. 630) that a gift is in contemplation of death if the motive which induced it is of the sort which leads to "testamentary dispositions" (citing *U. S.* v. *Wells*, 283 U. S. 102, 117) and that a purpose to avoid the estate tax is such a motive which would cause a decedent to make an *inter vivos* transfer rather than a will but that the thought of death must be the "impelling cause of the transfer." However, as this Court pointed out:

"On the other hand, every man making a gift knows that what he gives away today will not be included in his estate when he dies. All such gifts plainly are not made in contemplation of death in the statutory sense. Many gifts, even to those who are the natural and appropriate objects of the donor's bounty, are motivated by 'purpose associated with life, rather than with the distribution of property in anticipation of death.' *U. S. v. Wells, supra,* 283 U. S. at p. 118. * * * These motives cover a wide range. *Sec. 1 Paul Federal Estate and Gift Taxation* (1942) Secs. 6.09 et seq. There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death.' *U. S. v. Wells, supra,* 283 U. S. at p. 119. * * * Whether such a desire was the dominant, controlling or impelling motive is a question of fact in each case."

This Court remarked that in 1937 when the decedent released the power to amend, he accomplished the purpose which he originally had, but which he later discovered had not been achieved. In adverting to the argument of the Government, that the release of the power by the deceased was proof that the transfers were in contemplation of death "since admittedly the decedent in 1937 released the power to amend *so as to avoid paying an estate tax* on the property included under the trust", this Court held:

"But that is to isolate the release from all that preceded and to treat it as a wholly independent transaction. This is not a case where a settlor, having made one plan for the disposition of his property, later makes a different one to avoid death taxes. Mr. Spalding, in making the release, did what he originally intended to do—

to make complete and absolute gifts to his children, freed of all claims, including taxes. Retention of the power to amend would have brought the trust property into Mr. Spalding's estate and subjected it to the estate tax lien * * * He guessed wrong on the law, when he retained the power to amend. When he rectified the error, he was in good faith, endeavoring to complete his original project, not to give his children more than he had first intended in order to save taxes. * * * On these facts, his desire to avoid death taxes does no more than establish that he did not want his plan to underwrite the necessities of his children and grandchildren jeopardized."

This Court has thus held that the intention to save estate taxes does not of itself condemn a transfer as made in contemplation of death. In the *Allen* case, the purpose of saving taxes was to make a gift to the settlor's children free from all taxes, including estate taxes. But the intention to save taxes certainly existed in the *Allen* case and the settlor being a lawyer used his professional ability to effect such saving.

The holding of the Second Circuit in the cases above noted and in the case at bar, that the "preponderant motive in making the transfers was avoidance of estate taxes * * * These grounds suffice to bring all 12 policies into the estate of the decedent for purposes of taxation" (p. 121), is in conflict with the ruling of this Court in the *Allen* case. The Circuit Court in the instant case failed to cite the *Allen* case. Moreover, it is in conflict with the prevailing doctrine in the Third and Fifth Circuits. The finding of fact of the lower court that the transfers were made in contemplation of death (p. 111) was based solely upon the finding that the dominant motive in effecting the transfers was to escape estate taxes (p. 110). Accordingly, this Court is not pre-

cluded by any finding of fact that the transfers were made in contemplation of death, but there is presented a question of law whether, where the decedent's dominant purpose in effecting transfer is to escape estate taxes, such transfers are made in contemplation of death within the meaning of the Revenue Act.

2. *The condition of decedent's health, his age and other circumstances must be considered in determining whether the assignments were made in contemplation of death.*

The Commissioner stipulated in the case at bar that physicians who examined the decedent at the time of these transfers found that he was in good health and "a first-class risk" (p. 49), and that there was nothing about decedent "which would render risk in any way undesirable." The decedent did not die until 5 years after the transfers (p. 44), and at the time of the transfers he was only 45 years old. His bodily and mental condition gave no evidence of contemplation of death.

The lower court, although holding that the decedent was in good health at the time of the transfers (p. 111), also held that "the evidence of decedent's good health has contributed nothing to plaintiffs' case. *First Trust & Deposit Co.* v. *Shaughnessy*, C. C. A. 2nd, 134 F. (2d) 940" (p. 110). The Circuit Court ignored the question of the decedent's bodily and mental condition, but held to the mechanical rule that a finding that the transfer was made to save estate taxes required a finding that it was made in contemplation of death.

As this Court said in *United States* v. *Wells*, 283 U. S. 102 (at p. 117):

> "Death must be 'contemplated', that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. *As a condition of body and*

> *mind* that naturally gives rise to the feeling that death is near, that the Donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, *the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance* in determining whether it is made in contemplation of death."

and (at p. 119):

> "It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in 'contemplation of death' * * * There is no escape from the necessity of carefully scrutinizing the circumstnces of each case to detect the dominant motive of the donor *in the light of his bodily and mental condition*, and thus to give effect to the manifest purpose of the statute."

The failure of the District and Circuit Courts to credit the testimony of Mr. Schustek's healthy physical and mental condition was in conflict with *United States* v. *Wells*, *supra*. This refusal underscores the danger of the mechanical rule followed in the Second Circuit.

3. *The assignments of the policies were not transfers intended to take effect in possession or enjoyment at or after the decedent's death.*

Because of its finding that the transfers were made in contemplation of death, the District Court found it unnecessary to pass upon the plaintiffs' contention that the transfers were not intended to take effect in possession or enjoyment at or after death (p. 110). The Circuit Court, although addressing itself to this problem (pp. 120, 121), preferred to

rest its holding upon the view that the transfers were made in contemplation of death (p. 121).

If this Court grants certiorari and finds that the transfers were not made in contemplation of death, the further question will exist as to whether the possession or enjoyment of the policies were deferred until the time of, or following, the decedent's death. No extended brief as to this subject will be made at this point.

Reference only is made to the fact that there was a difference between the assignment to the decedent's wife of the four policies written by the Mutual Life Insurance Company and the other eight policies.

The Mutual policies named as beneficiary insured's wife, if living; if not, his daughter, if living; if not, his daughter's children; if none, the executors or administrators of the last survivor of the wife and daughter. Under no circumstances did the insured retain any strings to his gift. No reversion of any sort was retained in him or his estate. His death did not result in passing anything from the dead to the living. That the insured's estate might receive a portion of the proceeds from his wife's or daughter's estates by operation of law under the Statutes of Descent and Distribution (see Section 83 N. Y. Decedent Estate Law), in the absence of a will, cannot be equated with a reservation of any property interest in the deceased.

The other eight policies (Exs. 7 to 14) name the insured's estate as a contingent beneficiary only upon the pre-decease of the decedent's wife, his daughter, and the possible children of the daughter. To hold that such a remote and speculative interest in the deceased is sufficient to defer the possession and enjoyment of the policies until the decedent's death is (1) to overlook the absolute and immediate transfers of all interests under the policies to the insured's wife and the complete divestiture of any rights in the insured during his lifetime; (2) to arrogate a very remote contin-

gency to the position of a bar to the present enjoyment of the policies—a position inconsistent with the facts.

The language employed in each of the policies unambiguously divests the insured of all ownership in the policies and vests, immediately and without reservation, all the rights therein in the insured's wife in the first instance. The right of Helen Schustek to cancel the policies, to obtain the complete loan value thereunder, to assign them or to deal with them as she chose, was not contingent in any way upon the death of the insured. Without the concurrence of the deceased, his wife had every vestige of ownership which could be exercised without reference to the life or death of the deceased.

Although the problem of the nature of the reserved interest in a grantor has been before this Court on many occasions, there is still a large area of doubt as to the application of the principles. *Goldstone* v. *U. S.*, 325 U. S. 687, established the principles most closely analogous, and yet the Circuit Court of Appeals in the case at bar felt that the conclusion of this Court in the *Goldstone* case might result in a holding that the mere possibility of reverter arising solely by operation of the laws of intestacy in this case with respect to the four Mutual policies, was too remote and unsubstantial to render the proceeds of these policies subject to inclusion in the estate of the decedent. Interpretations vary of the *Goldstone* case, and the decisions of this Court in *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 324 U. S. 108, and *Commissioner* v. *Field's Estate*, 324 U. S. 113. For example, see the decision of the Tax Court in *Estate of Julius B. Weil* (T. C. Memo. [Revised Report] Docket No. 4052, November 1, 1946) (cross-appeals to Sixth Circuit pending); *Estate of Edward P. Hughes*, 7 T. C. 157. The *Hughes* case is definitely in conflict with *Commissioner*

v. *Bayne's Estate*, 155 Fed. (2d) 475, Second Circuit (cited by the Circuit Court in the case at bar—p. 121).

To clarify the principles that should maintain as to the quantum of the possibility of reverter necessary for the inclusion of an interest, it is requested that certiorari be granted.

4. *The evidence of the insurance broker regarding the motive of the insured in making the assignments was not binding on the executors, in view of the limited scope of the broker's authority.*

Over repeated objections of the petitioners, the respondent introduced four letters, each dated December 12, 1935 (pp. 87-89), two of which were signed by the decedent and addressed to two of the insurance companies involved. Each of these letters, which are identical, contain a strictly limited authority to these companies and authorize them to furnish the brokers "with any information or forms which they may request in connection with all life policies".

The other letters were written by the brokers to the companies, giving them instructions as to the transfers of the policies and stating that "the above change * * * is for the purpose of avoiding payment of tax."

There was no proof at the time that the insurance broker had any authority to make the statement contained in his letters to the insurance companies that the purpose for making the assignments was to avoid paying the estate taxes nor that the testator ratified the statements. The broker's authority was specifically circumscribed by the insured, and the broker's statements exceeded his authority. He had authority to obtain information and forms—he had no authority to speak the state of mind of his principal. His statements, therefore, are not binding upon the executors

of the insured. At the trial due objection was made to the broker's testimony and to the letters from the broker to the insurance companies (Exs. C and E) (pp. 87-89). Although the Court at first told counsel for the collector in ruling on petitioners' objection to any evidence of motive, "you are trying to have this witness fathom the mind of the deceased" (p. 78), he ultimately admitted the evidence and gave counsel for the petitioners an exception.

In *North Western Union Packet Co.* v. *Clough*, 87 U. S. 406, this Court stated the rule as follows at page 408:

> "Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts."

At bar, the authority of the insurance broker to obtain information and forms, or even to convey to the insurance companies the insured's desire respecting changes in beneficiaries and the transfer of ownership of the policies to his wife did not imply the authority to advise the insurance companies about the alleged motive in making the changes and assignments. There is no connection between the alleged admission introduced in evidence and the act which the insured authorized in writing.

The Restatement of the Law of Agency confirms this principle:

> "Sec. 288. When Agent Has Authority to Make Statements.
>
> (1) Authority to Do an Act or Conduct a Transaction Does Not of Itself Include Authority to Make

Statements Concerning the Act or Transaction.

Comment:

a. An agent is normally employed to do acts and to make contracts. He may also be employed to make statements in regard to his own acts or in regard to the acts or contracts of others. He may be employed to give receipts and conduct other transactions which are substantially statements in regard to past events. To the extent that he is authorized to do this, any statement made by him is admissible as if made by the principal. Where he is not otherwise authorized, however, no authority to make such statements may be inferred from the fact that he is authorized to conduct the transaction, and hence statements made by him as to the transaction are not admissible."

As was stated recently in *Paramount Productions, Inc.* v. *Smith*, 91 Fed. (2d) 863, cert. den. 302 U. S. 749:

"To be binding upon the principal, admissions must be made by an agent while acting within the scope of his authority and must relate to matters as to which that authority extends."

Proof was lacking that it was the custom of this broker to make such statements and that the statements were made during the course of business of the broker. The majority opinion premised its affirmance of the admission of such evidence on the ground of the shop book rule obtaining in the State of New York (Sec. 374-a, Civil Practice Act of the State of New York). The requirements of the New York Statute were surely not met in the case at bar. To come within Sec. 374-a, the Trial Judge would have to find not

only that a memorandum was made in the regular course of any business, but "that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event." This latter element was not adverted to by the Circuit Court.

Moreover, this ruling is in conflict with this Court's decision in *North Western Union Packet Co.* v. *Clough, supra,* and *Palmer* v. *Hoffman,* 318 U. S. 109.

There was no warrant of trustworthiness of the broker's letters which were unsigned by the insured. These letters bespoke the broker's, and not the decedent's, intentions. They went far beyond the broker's authority, as limited in writing, and of which the insurance companies had notice.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully yours,

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